

Slovenia's Supreme Court rejects the European Court of Human Rights

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On Wednesday 24th of October the Supreme Court of the Republic of Slovenia made a striking, indeed unprecedented, announcement. On its website it published an unsigned press release explaining the Supreme Court's reaction to the recent decision of the ECtHR in the case of [*Produkcija plus storitveno podjetje d.o.o. v Slovenija*](#) (No. 47072/15).

The ECtHR decision is entirely uncontroversial and the case is on its decontextualized premises completely routine. The ECtHR lays down its established jurisprudence and declares that Slovenia had violated Art. 6/1 of the ECHR, the right to a fair trial, since the Supreme Court ruled in the case without conducting an oral hearing. This was, in the ECtHR opinion, necessary since the Supreme Court was the first and only judicial instance to rule in the competition supervision procedure, in which, inter alia, a large fine of 105,000 Euros was imposed on the company for having obstructed the procedure. The facts constituting the obstruction were disputed, but the Supreme Court relied on the applicable statute according to which oral hearings are, as a rule, not conducted in such cases. The ECtHR disagreed and, by drawing on its established interpretation of the Convention, established a violation of its Art. 6/1.

To the surprise, indeed shock, of the professional, academic and all other observers, the Supreme Court announced that it respects the rulings of other courts that it finds persuasive. Such rulings are also integrated in its case law. This logically and necessarily means, even if the Supreme Court did not put it explicitly in those terms, that other rulings, namely those that the Supreme Court finds unpersuasive, will not be respected and integrated in its jurisprudence.

This applies, in particular, to the said decision of the ECtHR. The press release namely put it bluntly that the ruling of the ECtHR is unpersuasive on several accounts. Most notably, the Supreme Court believes that the ECtHR has wrongly interpreted the nature of the disputed procedure, which in Slovenia is not of a criminal character, and has, furthermore, failed to take into account the relevant Slovenian legislation.

As a champion of (constitutional) pluralism, I have long believed that national courts are not under an absolute duty of following blindly the decisions of transnational courts. In line with this theory, the courts are permitted, indeed required, to disapply the provisions of transnational law, including the decisions of the ECJ or ECtHR, shall they encroach on the irreducible epistemic core of a national legal order. This is composed of the national value equilibrium of the appropriate protection of human rights, rule of law, democracy and other specific traits of a national constitutional

identity. Shall national courts avail themselves of the irreducible epistemic core doctrine, they must, however, provide a compelling justification for it.

None of that has taken place in the reasoning of the Slovenian Supreme Court. The ECtHR has in no way impinged on the Slovenian irreducible epistemic core, let alone diminished the standards of human rights protection in Slovenia. To the contrary, Slovenia has been convicted since its standards of a fair trial fall below the minimum standards of the Council of Europe. The Supreme Court has thus rejected, by way of a press release (sic!), the ECtHR decision, which requires the increase of the standards of judicial proceedings in Slovenia. It has done so by stating reasons, which lack any basis in the Slovenian constitutional law, and what is worse, reveal a clear and blatant misunderstanding, indeed ignorance, of the jurisprudence of the ECtHR.

The Council of Europe thus, apparently, features another jurisdiction whose top court has declared the decisions of the ECtHR facultative, subject to its test of persuasiveness. In so doing, Slovenia hints at joining the regimes of Russia and Turkey. Moreover, this case is not an isolated “incident.” It is for the second time in a row now that Slovenia has been convicted by the ECtHR, since its courts (in administrative procedures) are not conducting oral hearings. However, the response of the Administrative court in the [Mirovni inštitut](#) case 32303/13 was almost identical: we have followed the statute and therefore could not be held accountable for a violation of the right to a fair trial. It goes without saying, that such practice has nothing to do with constitutional pluralism. It is a sign of constitutional dilettantism, which is incompatible with the Slovenian and European constitutional standards, and which, most importantly, threatens to derail the European system of human rights protection.

